Supreme Court, U.S.
FILED
JAN 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1165

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NANTAHALA POWER AND LIGHT COMPANY, TAPOCO, INC., and ALUMINUM COMPANY OF AMERICA,

Appellants,

—v.—

STATE OF NORTH CAROLINA ex rel. UTILITIES COMMISSION; LACY H. THORNBURG, Attorney General, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

JURISDICTIONAL STATEMENT

REX E. LEE*
DAVID W. CARPENTER
SIDLEY & AUSTIN
1722 Eye St., N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Appellants

Of Counsel:

RONALD D. JONES
DAVID R. POE
M. REAMY ANCARROW
LEBOEUF, LAMB, LEIBY & MACRAE

EDWARD S. FINLEY, JR.
WILLIAM D. JOHNSON
GRADY L. SHIELDS
HUNTON & WILLIAMS

**Counsel of Record*

QUESTIONS PRESENTED

The questions presented in this appeal are the identical questions presented in *Nantahala Power and Light Company et al. v. State of North Carolina ex rel. Utilities Commission et al.*, No. 85-568, prob. juris. noted, December 9, 1985 (*Nantahala I*):

1. Whether the Federal Power Act permits a state regulatory commission, in setting retail rates within the state's borders, to reject the interstate wholesale cost and power allocations that FERC regulates and, in this case, actually approved?

2. Whether the Commerce Clause permits a state regulatory commission to give its citizens a preference on the inexpensive hydroelectric power generated in a multi-state area?

PARTIES BELOW

The appellants in the North Carolina Supreme Court were Nantahala Power and Light Company, Tapoco, Inc., and Aluminum Company of America.

The appellees were State of North Carolina ex rel. Utilities Commission; Lacy H. Thornburg, Attorney General; Public Staff of the North Carolina Utilities Commission; Henry J. Truett; Town of Bryson City; Swain County Board of County Commissioners; Cherokee County; Graham County; Jackson County; Town of Andrews; Town of Dillsboro; Town of Robbinsville; Town of Sylva; Tribal Council of the Eastern Band of Cherokee Indians; and Derol Crisp.

RULE 28.1 STATEMENT

Appellants Nantahala Power and Light Company and Tapoco, Inc. are each wholly-owned subsidiaries of Aluminum Company of America ("Alcoa"). Alcoa has no parent company. The companies (other than wholly-owned subsidiaries) in which Alcoa has ownership interests are listed in a supplemental statement that appears in the Appendix to this Jurisdictional Statement.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES BELOW	ii
RULE 28.1 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	6
CONCLUSION	7

TABLE OF AUTHORITIES

Cases PAGE

Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375 (1983) 2

Nantahala Power and Light Company et al. v. State of North Carolina ex rel. Utilities Commission et al., No. 85-568, prob. juris. noted, December 9, 1985 (*Nantahala I*) ..... *passim*

Sultan Railway & Timber Co. v. Department of Labor and Industries, 277 U.S. 135 (1928) 2

Administrative Decisions

Nantahala Power & Light Co., 19 F.E.R.C. ¶ 61,152, *aff'd in part and reh'g denied in part*, 20 F.E.R.C. ¶ 61,430 (1982) 4n.1

Statutes

Federal Power Act, 16 U.S.C. §§ 791a-828c 2

N.C. Gen. Stat. §§ 62-1 *et seq.* 2

28 U.S.C. § 1257(2) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-

NANTAHALA POWER AND LIGHT COMPANY, TAPOCO, INC., and ALUMINUM COMPANY OF AMERICA,

Appellants,

—v.—

STATE OF NORTH CAROLINA ex rel. UTILITIES COMMISSION; LACY H. THORNBURG, Attorney General, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion and judgment of the North Carolina Supreme Court (Appendix ("App.") 1a-11a) is reported at 314 N.C. 246 and 333 S.E.2d 217. The opinion of the North Carolina Court of Appeals (App. 13a-21a) is reported at 66 N.C. App. 546 and 311 S.E.2d 610. The opinions of the North Carolina Utilities Commission, dated June 8, 1982 and August 12, 1982 (App. 23a-126a) are unreported. In addition, the following decisions of FERC were issued in a parallel proceeding: the FERC decision asserting jurisdiction over the allocation contract, reported at 13 FERC ¶ 61,192 (CCH); the FERC Administrative Law Judge decision, reported at 15 FERC ¶ 63,014 (CCH); FERC Opinion No. 139, reported at 19 FERC ¶ 61,152 (CCH); and FERC Opinion No. 139-A, reported at 20 FERC ¶ 61,430 (CCH). Pertinent portions of these FERC

decisions are reproduced in the Appendix to the Jurisdictional Statement in No. 85-568, filed on September 30, 1985. (J.S. App., No. 85-568, 262a-301a)

JURISDICTION

The final judgment of the North Carolina Supreme Court was entered on August 13, 1985. Nantahala's Notice of Appeal (App. 144a-145a) was filed in the Supreme Court of North Carolina on August 22, 1985; Alcoa's Notice of Appeal (App. 141a-142a) was filed on September 19, 1985; and Tapoco's Notice of Appeal (App. 148a-149a) was filed on September 23, 1985. On October 30, 1985, the Chief Justice entered an order extending appellants' time to docket their appeal until January 10, 1986. This Court has jurisdiction under 28 U.S.C. § 1257(2). *See Nantahala Power & Light Co. v. State of North Carolina ex rel. Utilities Commission*, No. 85-568, prob. jur. noted, December 9, 1985 (*Nantahala I*); *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375 (1983); *Sultan Ry. & Timber Co. v. Department of Labor and Indus.*, 277 U.S. 135, 136 (1928).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Article VI, Clause 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . ."

The United States Constitution, Article I, Section 8, Clause 3: "The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States. . . ."

The pertinent provisions of the Federal Power Act, 16 U.S.C. §§ 791a-828c, and of the North Carolina Public Utilities Act, N.C. Gen. Stat. §§ 62-1, *et seq.*, are reprinted at App. 127a-139a.

STATEMENT OF THE CASE

This case is identical in all relevant respects to *Nantahala I*, No. 85-568, in which the Court noted probable jurisdiction on December 9, 1985. The only difference between the two cases is that they pertain to two different periods of time over which the Federal Energy Regulatory Commission (FERC) and the North Carolina Utilities Commission (NCUC) have made vastly different allocations of low-cost hydroelectric power to which the appellants and their customers are entitled.

Because the two cases are virtually identical the Statement of the Case contained in the Jurisdictional Statement in *Nantahala I* need not be repeated here. For the Court's convenience, however, we will summarize the facts briefly.

The appellants, Nantahala Power and Light Company (Nantahala) and Tapoco, Inc. (Tapoco) are both wholly-owned subsidiaries of the appellant Aluminum Company of America (Alcoa) and both generate and distribute electricity. Nantahala serves only a public load, consisting of retail customers and three wholesale customers in North Carolina. Tapoco's only customer is Alcoa's aluminum plant in Tennessee. In 1962, the Tennessee Valley Authority (TVA), Nantahala, Tapoco, and Alcoa entered into what has been called the New Fontana Agreement (NFA), under which TVA controls the generation of power at Nantahala's and Tapoco's facilities and distributes that power over its interstate electric grid. Nantahala and Tapoco, in return, receive entitlements to TVA Power, which entitlements were allocated between the two of them in a 1971 Apportionment Agreement. These entitlements are not sufficient to satisfy either the needs of Nantahala's public customers in North Carolina nor Tapoco's customer, Alcoa, in Tennessee. Accordingly, each must purchase supplemental power from TVA. Because the supplemental power costs several times as much as the entitlement power, each of the states involved, and all of their electric consumers, would like

to have just as much as possible of the inexpensive entitlement power.

The FERC, pursuant to its responsibility to set just and reasonable wholesale rates and to make wholesale power cost allocations, has considered the proper allocation of these low-cost entitlements between Nantahala and Tapoco. In extensive proceedings in which the North Carolina Attorney General participated on behalf of Nantahala's retail customers, FERC examined the NFA and the 1971 Apportionment Agreement which were filed with it as rate schedules. The Commission held that the NFA was "the result of arms length bargaining" and made no adjustments in it. With regard to the 1971 Apportionment Agreement, however, the Commission, as stated in its brief in *Nantahala I* "did decide . . . that adjustments were required . . . to give a somewhat bigger share of the entitlements from TVA to Nantahala, and decided how much that greater share would be."[1]

The NCUC followed a very different approach, and reached a very different result. The NCUC adopted a "roll-in" method of ratemaking that it described as "nicely suited" as an alternative to reformation of the parties' federally regulated agreements. The NCUC's approach was premised on the assumption that local North Carolina customers should have a "first call" preference on the inexpensive hydroelectric power generated by Nantahala and Tapoco in both North Carolina and Tennessee. The NCUC allocated far larger amounts of the low-cost power to Nantahala and its North Carolina customers than FERC had allocated. It also directed Nantahala to make

---

1 Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae at 3-4, *Nantahala I*, No. 85-568. The two FERC orders (arising out of both a rate increase filed by Nantahala and a complaint by some of Nantahala's customers) are reported as *Nantahala Power & Light Co.*, 19 F.E.R.C. ¶ 61,152, *aff'd in part and reh'g denied in part*, 20 F.E.R.C. ¶ 61,430. See J.S. App. at 283a-313a, *Nantahala I*, No. 85-568.

refunds to its customers and held Alcoa liable for these obligations to the extent Nantahala was unable to meet them.[2]

Both *Nantahala I* and the instant case are appeals from separate decisions of the NCUC affirmed by the North Carolina Court of Appeals and the North Carolina Supreme Court.[3] The method used by the NCUC in both cases is the same, and in both, the method and the results were different from FERC's. The adverse impacts of the NCUC's orders on federal interests as discussed by the Government's amicus brief in *Nantahala I* are the same in this case. The NCUC order in *Nantahala I* covers the time period June 1977 through July 1981, and requires refunds of approximately $29 million including interest. This case involves the twenty eight months immediately following the period covered by *Nantahala I*, and requires Nantahala and Alcoa to pay refunds of approximately $16 million, including interest.[4]

---

2 The Solicitor General's brief in *Nantahala I*, No. 85-568, *supra* note 1, describes the effect of the NCUC's methodology on Alcoa:

> Alcoa was made responsible for all the residual costs after what the NCUC assigned Nantahala. Alcoa thus was required to assume the costs not only of all of its own TVA purchases, but 75% of Nantahala's as well. Alcoa's share of the costs was further swollen by that attributable to the power that went to TVA and was not reflected in entitlements received in return.

Id. at 5 (citations omitted).

3 The NCUC orders and opinions in *Nantahala I*, designated as Docket E-13, Sub 29, are reproduced in the appendix to the Jurisdictional Statement in that case, at pages 165a-247a. The orders and opinions in this case, NCUC Docket E-13, Sub 35, are reproduced at pages 23a-126a of the appendix to the Jurisdictional Statement.

4 The monthly amount of the "refund" obligation is larger over the twenty eight-month period covered by this case, mainly because under the NCUC's orders, Nantahala's percentage of the inexpensive capacity entitlements increases proportionately to the increases in Nantahala's peak load requirements. See footnote 14 of the Jurisdictional Statement in *Nantahala I*.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

There is agreement on all sides that this case and *Nantahala I* are virtually identical. As stated by the appellees: "[t]he only material difference between the two cases is the 'test period' used by the NCUC in setting retail rates for Nantahala Power and Light Company."[5]

Accordingly, the Court could note jurisdiction in this case and consolidate it for argument with *Nantahala I*. The appellants' merits brief in *Nantahala I* will be timely filed on January 23, and the case will be fully briefed and ready for argument before the conclusion of the Court's regularly scheduled arguments for this term. Noting jurisdiction in this case and consolidating it for argument with *Nantahala I* would require neither additional briefing nor additional argument time.

We recommend, however, that this case be held for *Nantahala I*. There is nothing in the facts or the procedural history of this case that would in any way aid the Court in resolving the questions presented by the two cases. Accordingly, noting jurisdiction at this time is not necessary.

---

5 Response to Appellants' Application for Extension of Time, No. A-320, p. 1, ¶ 2, October 30, 1985.

CONCLUSION

The Court should retain this case on its docket, pending its final decision in No. 85-568, at which time this case can be disposed of consistently with the Court's judgment and decision in No. 85-568.

Respectfully submitted,

REX E. LEE*
DAVID W. CARPENTER
SIDLEY & AUSTIN
1722 Eye St., N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Appellants

Of Counsel:

RONALD D. JONES
DAVID R. POE
M. REAMY ANCARROW
LEBOEUF, LAMB, LEIBY & MACRAE

EDWARD S. FINLEY, JR.
WILLIAM D. JOHNSON
GRADY L. SHIELDS
HUNTON & WILLIAMS

Dated: January 10, 1986

**Counsel of Record*